BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH A. MOEHLMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,288
CRESTVIEW NURSING HOME	)	
Respondent	)	
AND	)	
	)	
ALLIED MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the preliminary hearing Order entered by Administrative Law Judge Alvin E. Witwer on November 26, 1996.

ISSUES

Respondent contends the Administrative Law Judge exceeded his jurisdiction when determining preliminary benefits because the evidence does not establish that the claimant made a timely written claim. The respondent further contends that the Administrative Law Judge exceeded his authority when ordering respondent to pay temporary total disability compensation because that issue was not properly before him.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds that the preliminary hearing Order should be affirmed.

For the purpose of this appeal, respondent concedes claimant sustained a compensable injury on December 6, 1995, provided notice of accident to her employer and was sent to Delmont C. Hadley, M.D., for treatment on December 7, 1995. Dr. Hadley instructed claimant to followup by telephone concerning her progress. On February 24,

1996, claimant called Dr. Hadley's office and reported that her symptoms were persisting. Dr. Hadley recommended she see a specialist and referred claimant to Dr. Daniel D. Schaper, an orthopedic surgeon. Claimant was seen by Dr. Schaper on March 1, 1996.

The Administrative Law Judge found that claimant had completed an incident report on or about December 6, 1995, and found that report to constitute a written claim for compensation. The incident report was not offered into evidence at the preliminary hearing. However, claimant did not testify that she completed the incident report with the intention of claiming compensation. Therefore, the Appeals Board finds that there is insufficient evidence to hold the incident report satisfies the written claim requirement of K.S.A. 44-520a.

The Administrative Law Judge found that the written claim was also timely because respondent referred claimant to Dr. Hadley and Dr. Hadley referred claimant to Dr. Schaper. Therefore, Dr. Schaper's treatment was authorized. As such, it constituted compensation for purposes of extending the time for filing written claim.

Respondent admits receiving written claim July 24, 1996 by letter from claimant's counsel. However, respondent disputes that claimant's time for filing written claim was extended beyond claimant's December 7, 1995 office visit to Dr. Hadley because Dr. Schaper's treatment was not authorized. Respondent argues claimant knew the referral to Dr. Schaper was not authorized by virtue of a March 1, 1996 conversation with her supervisor. It is not necessary to resolve that question in order to decide the issue of whether written claim was timely made because Dr. Hadley was, admittedly, authorized and claimant had never been advised that Dr. Hadley was no longer authorized. Accordingly, claimant was still under the care and treatment of Dr. Hadley when he made the February 24, 1996 referral to Dr. Schaper. That date was within 200 days of the admitted July 24, 1996 claim for compensation. Hence, written claim was timely made.

The second issue raised by respondent concerns the jurisdiction of the Administrative Law Judge to order respondent to pay temporary total disability compensation when that issue was not raised in claimant's notice of intent letter. K.S.A. 1996 Supp. 44-534a (a)(1) provides:

> "At least seven days prior to filing an application for a preliminary hearing the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing."

Respondent objects to the preliminary award of temporary total disability compensation when claimant's notice of intent letter only made reference to a demand for medical benefits. K.S.A. 1996 Supp. 44-534a (a)(2) provides:

> "Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues."

Respondent does not contend that it was denied the opportunity to present evidence on the issue of claimant's eligibility for temporary total disability compensation. In fact, respondent did present the testimony of Mary Ann Strickland, Administrator for Crestview Nursing Home. In addition, respondent was aware at the onset of the hearing that claimant would be asking for temporary total disability compensation in addition to medical benefits. Respondent's counsel had the opportunity to cross-examine claimant in this regard. There was no proffer by respondent as to any evidence respondent wished to present or that respondent would have presented had it received earlier notice. Furthermore, respondent did not request that the record be left open for the presentation of additional evidence. Accordingly, there is no showing that respondent was denied due process or an opportunity to be heard. It is significant that respondent did not allege such a denial. Respondent is correct in that claimant did not adhere to the strict letter of the law by satisfying the procedural requirements of K.S.A. 1996 Supp. 44-534a(a)(1). Nevertheless, the Appeals Board finds the deficiency in claimant's notice of intent letter did not divest the Administrative Law Judge of jurisdiction to award temporary total disability compensation. The notice of intent letter was sufficient to get the matter before the Administrative Law Judge for a preliminary hearing. Once there, "the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act." The deficiency in the notice of intent letter would be significant were respondent to claim surprise and prejudice. This could justify keeping the record open in order to give respondent the opportunity to present additional evidence. However, no such request was made by respondent during the preliminary hearing and neither is it being requested in this appeal. In addition, respondent has the option of seeking another preliminary hearing on the issue of claimant's temporary total disability. Furthermore, K.S.A. 1996 Supp. 44-534a(b) gives respondent the added remedy of receiving a reimbursement of the temporary total disability compensation, if "upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed." With these protections, it would appear inappropriate to require claimant to schedule a second preliminary hearing

for the purpose of requesting temporary total disability compensation. Under the circumstances, such would neither serve the interest of justice nor the efficient utilization of judicial/administrative resources.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Alvin E. Witwer dated November 26, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 1997.

BOARD MEMBER

c: Greg Noll, Topeka, KS
Bret C. Owen, Topeka, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director